

Institutional Controls –
Enforcement Tools
IC Roundtable
April 2006



Enforcement Tools for ICs

- Introduction
- IC Enforcement First Memo
- UAOs for ICs
- Regional Examples
- Model CD language
- Open Discussion



Enforcement First for Institutional Controls

- OSRE/OSRTI memo reemphasizes enforcement first approach for ICs
 - Signed by Mike Cook and Susan Bromm March 17, 2006
 - 2002 “Enforcement First” Memo applies throughout the Superfund Cleanup Process
- Supports the EPA *Strategy to Ensure Institutional Controls Implementation at Superfund Sites* (September 2004)
- “EPA strives to ensure that the PRPs remain responsible for the implementation of ICs, including the identification and resolution of any issues impacting their continued effectiveness.”



Enforcement First for Institutional Controls

- Evaluating effectiveness and ensuring implementation of ICs may include:
 - Studies and evaluations of the design, monitoring, implementation and enforcement of ICs (including current and future potential land uses)
 - Analyzing real property title information, and resolving any issues that impact IC effectiveness
 - Utilizing IC tools (e.g., mapping, “one-call” system, statutory environmental covenants)
 - Addressing the long-term stewardship of ICs (e.g., reporting and financial assurance) through updated O&M plans, IC Implementation and Assurance Plans, or other site plans
- Memo discusses examples of provisions in the model RD/RA Consent Decree
 - Paragraph 14 –“Modification of the SOW or Related Work Plans”



Unilateral Administrative Orders (UAOs): Implementing Institutional Controls



by Mike Hendershot and
Carlos R. Evans

IC Roundtable-Enforcement Tools
Panel, Tucson, Arizona
April 4-6, 2006

What are UAOs?

- **Unilateral administrative Orders (CERCLA § 106) are:**
 - Orders issued by EPA that require the named parties to conduct response activities at the site.
 - **If the named parties do not comply w/o sufficient cause:**
 - Penalties of up to \$32,500/day (CERCLA § 106(b)); and
 - Treble CERCLA damages (3x cost of response action (CERCLA § 107(c)(3)).
 - **Complying parties may seek reimbursement costs from EPA if the party proves:**
 - Party is not liable under CERCLA § 107(a); or
 - Action was “arbitrary and capricious or otherwise not in accordance with law.”
- 

Why would U.S. EPA want to issue UAOs to implement ICs only?

- Scenarios:
 - “PRP Owner,” who has refused to settle alongside the Performing PRPs (who cleaned up property), is now refusing to restrict the use of the land;
 - PRP may refuse EPA/State’s efforts to restrict PRP’s land in a fed-lead/state-lead enforcement action.
 - Adjacent property owners may reject PRP’s best efforts to restrict the use of non-settling party property.
 - Subsequent property owners of source property may reject efforts of PRP (owner of site when CD was signed) to restrict the use of the source property.

Why would U.S. EPA want to issue UAOs to implement ICs only? (Cont.)

- 1990 “Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Design and Remedial Action”:
 - In promoting its enforcement first, polluter pays goals, U.S. EPA considers UAOs before fund-lead cleanups. If U.S. EPA decides to commence a fund lead cleanup prior to issuing a UAO, written justification is required.
- Reaffirmed in Suarez/Horinko memo, September 20, 2002

What types of controls are available to U.S. EPA?

- U.S. EPA might require:
 - Express use restrictions outlined in the UAO;
 - Proprietary controls (e.g., restrictive covenants);
 - Government controls (e.g., use ordinance and building permits); or
 - Informational devices (e.g., deed notices)



Can U.S. EPA issue UAOs for ICs only?

- **CERCLA § 106:**
 - Permits U.S. EPA may secure *such relief as is necessary* to abate danger when: “There may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility. . . .”
 - “[A]n endangerment is ‘imminent’ if conditions which give rise to it are present, even though the actual harm may not be realized for years.” B.F. Goodrich v. Murtha, 697 F. Supp. 89, 96 (D. Conn. 1988).
 - “An endangerment is “substantial” whenever members of the public or the environment *may be exposed* to a risk of harm by virtue of a release or threatened release of hazardous substances.” U.S. v. Conservation Chemical, 619 F. Supp. 162, 196 (W.D. Mo. 1985) (emphasis added).

Can U.S. EPA issue UAOs for ICs only? (Cont.)

- **In 106 “ISE” cases, Courts have not been persuaded by owners who:**
 - Draft proposals that would alleviate the risk;
 - Submitted evidence showing that EPA’s response was not the only/best response;
 - Already constructed and maintained a remedy (petitioner was not legally obligated to continue O & M).



Takings

- Fifth Amendment prohibits taking private property for public use without “just compensation.”
- The Supreme court has found a categorical regulatory taking only when the federal government strips owner’s property of “all economic beneficial use.” Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

Takings (Cont.)

- Otherwise, courts use the *Penn Central Test*, weighing: the economic impact of action on the property, the extent of any interference with distinct investment-backed expectations, and the character of government's conduct. Penn Central Trans. v. NY City, 438 U.S. 104 (1978).
- JR Sand v. U.S.: Takings (i.e., restriction of property rights) cannot occur unless state property law gave owner those property rights.

Conclusion

- A variety of circumstances require the implementation of ICs through UAOs.
- CERCLA § 106's broad "imminent and substantial endangerment" language provides U.S. EPA with broad authority to use UAOs.
- Note that the UAO may not be the first or only tool that might be considered by U.S. EPA to restrict the property. U.S. EPA may choose to bring an enforcement action against the property owner. Also, new owner may claim Bona fide prospective purchaser status. However, owner loses BFPP status if necessary IC is not implemented.

IMPOSING INSTITUTIONAL CONTROLS THROUGH CERCLA UNILATERAL ADMINISTRATIVE ORDERS

Michael A. Hendershot
Senior Assistant Regional Counsel
United States Environmental Protection Agency
Region III

A stylized, low-poly silhouette of a mountain range in shades of brown and tan, positioned at the bottom of the slide against a blue background.

GUIDING PRINCIPLES

- Use only the restrictions necessary to protect the integrity, protectiveness and implementation of the remedy and prevent exposure to residual contamination.
- Limit the restrictions only to necessary portions of the site.
- If applicable, provide for separate restrictions for different areas of the site.

GUIDING PRINCIPLES (CONT)

- Make it clear where the restricted areas are located.
- Provide notice to future owners.
- Provide EPA, State and PRP with access.



BACKGROUND—DELAWARE SAND AND GRAVEL SUPERFUND SITE

- Former industrial waste disposal site with discrete disposal locations. Owner/Operator conducts a salvage business there.
- Drum Disposal Area (DDA)--Large volumes of liquid wastes, including organic chemicals, had been disposed of in soils at the DDA. ROD called for in-situ bioremediation of DDA soils using a large complex of pipes, pump houses, liquid oxygen tank and a treatment building.

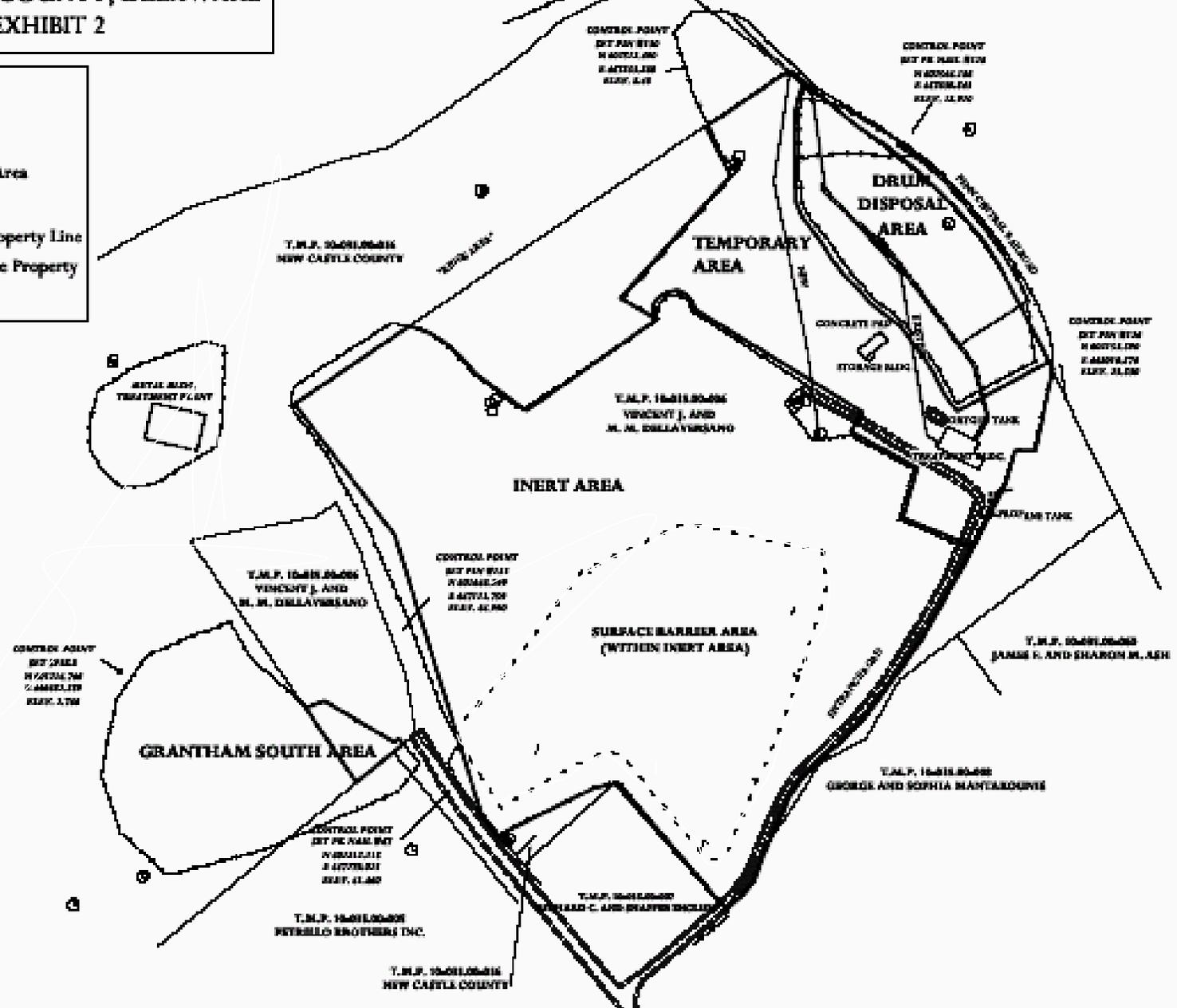


BACKGROUND (CONT)

- Inert Landfill--contains debris and mixed chemical wastes 20-35 feet thick. The ROD called for a RCRA cap. PRPs built a wear surface on top surrounded by a Jersey barrier to accommodate owner's business.
- Grantham South Landfill--contains debris and mixed chemical wastes approximately 35-feet thick. Remedy called for a RCRA cap—no wear surface.

**DELAWARE SAND & GRAVEL
NEW CASTLE HUNDRED
NEW CASTLE COUNTY, DELAWARE
EXHIBIT 2**

- Fence Line
- Pipe
- Building
- Surface Barrier Area
- Slurry Wall
- Approximate Property Line
- Respondent's Site Property
- Monitor Wells



WHAT THE UAO DID

- Specified separate use restrictions for the Drum Disposal, Grantham South and Inert Areas.
- Those restrictions were necessary to protect the engineering components of the remedy and prevent exposure.



WHAT THE UAO DID (CONT)

- Required the owner to file a notice with the recorder of deeds (Title Notice). EPA drafted the Title Notice and attached it to the UAO.
- Title Notice recited site information and requirements regarding access, use restrictions and notification of successors in title.



WHAT THE UAO DID (CONT)

- UAO made it clear where restricted areas were located by attaching a map to the UAO.
- EPA met with the owner and his representatives before UAO issuance to review the restrictions and the features depicted on the map. Owner understood the map and restrictions.



THE RESTRICTIONS— GENERALLY

- Don't use the site in any way which could adversely affect the integrity and protectiveness of the remedy.
 - Don't interfere with remedial implementation.
 - Unless necessary for the remedy, comply with certain use restrictions and requirements.
- 

THE RESTRICTIONS AND REQUIREMENTS—INERT LANDFILL— SURFACE BARRIER AREA

- Place protective materials on wear surface if you're using oil, transmission fluid, other hazardous liquid. Clean up spills.
- Prevent gouging of cap. Fix gouges.
- Load and weight limitations for vehicles, other objects.

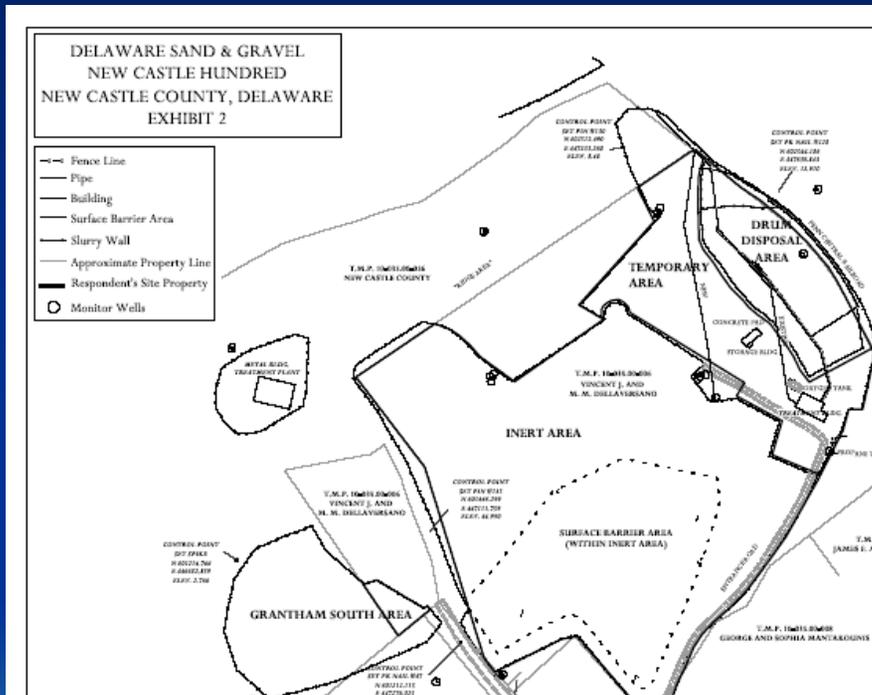


THE RESTRICTIONS AND REQUIREMENTS—INERT LANDFILL—SURFACE BARRIER AREA (CONT)

- Don't conduct any welding.
- Don't place any object there which could damage the SBA.
- Don't install domestic or public water supplies at the site.



THE RESTRICTIONS AND REQUIREMENTS—REMAINDER OF INERT LANDFILL



- Same requirements as Grantham South Landfill—steeply sloped, vegetated, only light use permitted.
- Owner needs to get EPA approval before use.

GUIDING PRINCIPLES

- Use only the restrictions necessary to protect the integrity, protectiveness and implementation of the remedy and prevent exposure to residual contamination.
- Limit the restrictions only to necessary portions of the site.
- If applicable, provide for separate restrictions for different areas of the site.



GUIDING PRINCIPLES (CONT)

- Make it clear where the restricted areas are located.
- Provide notice to future owners.
- Provide EPA, State and PRP with access.



Regional Examples

Ben, Mike & Virginia



Institutional Controls

When you have a Grantor, But No Grantee(s)

When you have an Owner Defendant under an older RD/RA CD who is willing to cooperate with the Agency in Placing Land Use Restrictions on the Site Property – but you lack a definitive grantee(s) who will assume the right/obligation to enforce these controls...



Grantor/owner may enforce this Restrictive Covenant by proceedings at law or in equity against any person violating or attempting to violate the covenants herein. In the event of any conveyance, assignment or transfer of the Restricted Area...Grantor shall expressly reserve in the deed or other instrument effecting the transfer, an irrevocable and permanent easement which grants Grantor: 1) the right to access for purposes of carrying out its obligations under the CD and this Restrictive Covenant; and 2) the right to carry out and enforce the land use restrictions set forth in the ROD...Grantor shall enforce the terms of any such covenants or land use restrictions reserved in this instrument against all subsequent grantees of an assignment or transfer of the Restricted Area of the Site...

IMPOSING INSTITUTIONAL CONTROLS THROUGH REAL ESTATE CONVEYANCES

Michael A. Hendershot
Senior Assistant Regional Counsel
United States Environmental Protection
Agency
Region III



GUIDING PRINCIPLES

- Use only the restrictions necessary to protect the integrity, protectiveness and implementation of the remedy and prevent exposure to residual contamination.
- Limit the restrictions only to necessary portions of the site.
- If applicable, provide for separate restrictions for different areas of the site.

GUIDING PRINCIPLES (CONT)

- Make it clear where the restricted areas are located.
- Provide notice to future owners.
- Provide EPA, State and PRP with access.



THE PROCESS

- Current owner (grantor) conveys the property to a new owner (grantee) through a deed.
- Deed contains reservations of a covenant (use restrictions) and access requirements.
- Deeds make EPA the grantees' authorized representative for access.
- Deed makes EPA a third-party beneficiary for enforcement purposes.



BACKGROUND—BERKS LANDFILL SUPERFUND SITE

- Two former co-disposal landfills with associated groundwater contamination and leachate collection system.
 - Remedy called for repair of landfill caps and leachate collection system; implementation of ICs.
- 

IC IMPLEMENTATION

- EPA had issued a UAO to property owners and other PRPs to conduct remedy.
- The UAO divided the site into four parcels and imposed separate use restrictions for each of those parcels.
- A prospective purchaser wanted to buy a parcel from an owner UAO respondent. Parcel contained part of a landfill and groundwater contamination.

PROSPECTIVE PURCHASER'S INTENDED USE OF THE PROPERTY

- PP, local businessman, wanted to demolish existing building, surround the property with a fence and erect commercial storage units.
- EPA believed uses were protective of cap and groundwater remedy and were consistent with UAO.
- PP got a comfort letter.

THE DEED

- Owner UAO respondent (grantor) sold property to PP (grantee).
- Grantor reserves certain restrictions (restrictive covenants).
- Grantor reserves access for itself and authorized representatives in order to implement the remedy.
- EPA is an authorized representative.

THE DEED (CONT)

- Restrictive covenants and access requirements run with the land.
- EPA is an intended third-party beneficiary for purposes of enforcing restrictions and access requirements.



THE RESTRICTIONS (SOME OF THEM)

- 1. Unless necessary for implementation of the Remedial Action for the Site, no installation or use of new groundwater wells on the property;
- 2. No existing groundwater wells on the property shall be used for drinking water;
- 3. No commercial or industrial activities shall be permitted on the property which would adversely affect the protectiveness, integrity and ongoing implementation of the Remedial Action for the Site;
- 4. There shall be no disturbance of the surface of the property by filling, drilling, excavation, removal of top soil, rock or minerals, or change in topography in any manner which would adversely affect the protectiveness, integrity or ongoing implementation of the Remedial Action for the Site;



CONCLUSION

- The usual guiding principles.
- EPA had confidence in PP's stewardship of property.
- Access requirements and restrictive covenants ran with land.



Institutional Controls at the Jones Sanitation Superfund Site, Hyde Park, New York

By Virginia Capon, Esq.

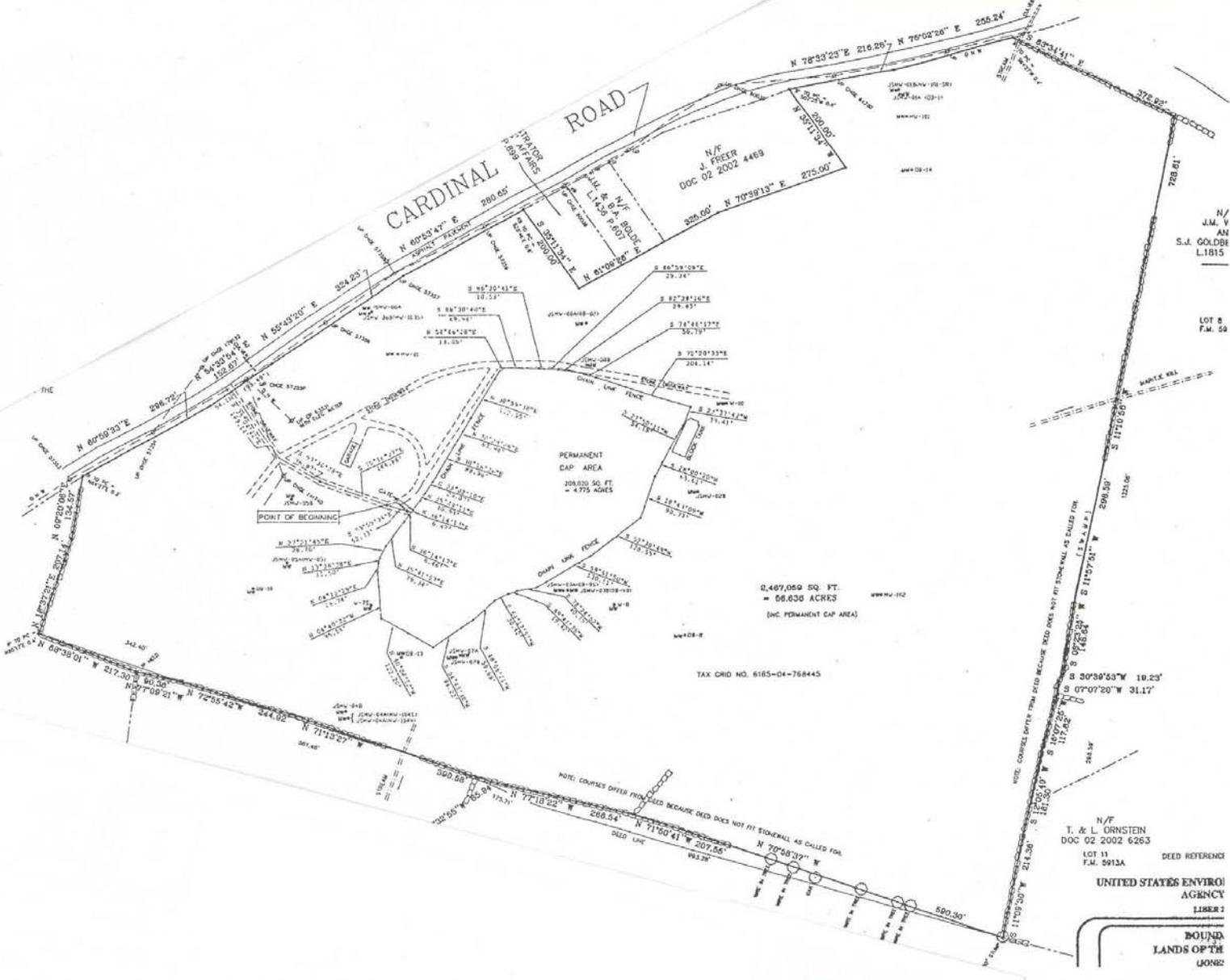
EPA, Region 2

capon.virginia@epa.gov



CARDINAL ROAD

DOHOUSE
.166



2,407,050 SQ. FT.
= 56.630 ACRES
(INC. PERMANENT CAP AREA)

TAX ORD NO. 6165-04-76845

N/F
T. & L. ORNSTEIN
DOC 02 2002 6263
LOT 11
F.M. 5913A

DEED REFERENCE
UNITED STATES ENVIRO/
AGENCY

BOUND
LANDS OF THE
STATE

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J.M. V
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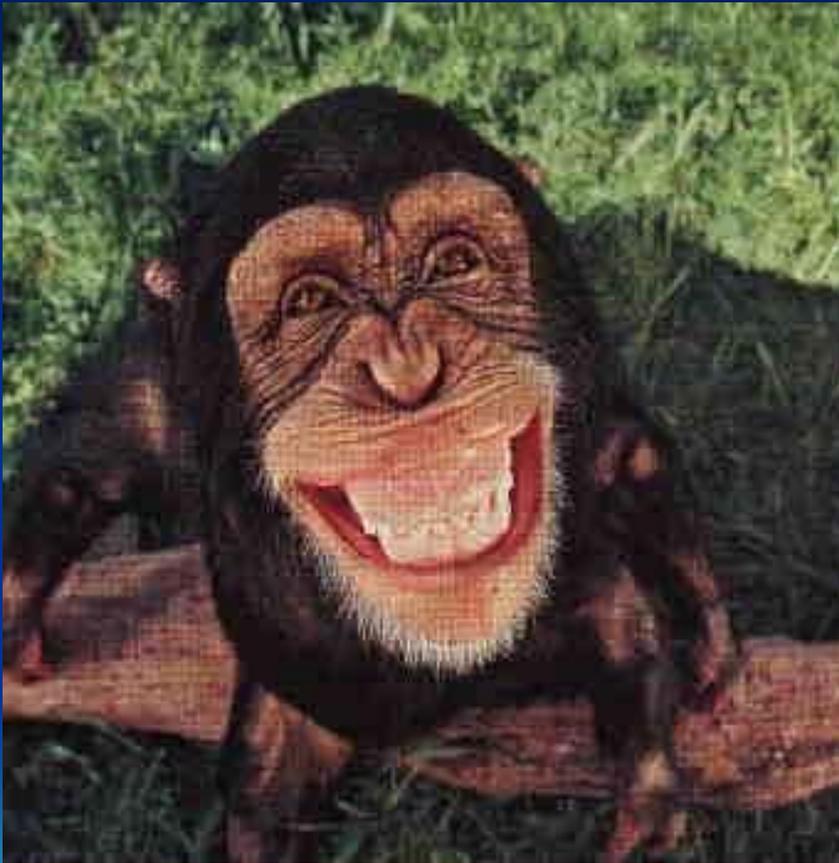
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Problems in Finalizing the Jones Easement/Covenant



- PRPs Didn't Take ICs Seriously
- Local Counsel Unfamiliar w/EPA Model Easement
- Title Co. Balked
- Survey Incorrect
- Owner Needed Special Conditions on Future Use

Lessons Learned...



PLAN AHEAD

- GET RIGHT PEOPLE INVOLVED
(Attorneys)
- BE PROACTIVE
(give EPA guidance)
- SWEAT THE DETAILS

Model Enforcement Documents

Melissa Franolich

USEPA

OECA/OSRE/RSD



Proposed Changes the RDRA model will now address:

- Institutional Control Plan
- IC requirements when owner transfers property
- Third Party Beneficiary situations
- Title searches and best efforts to do so



Other Enforcement Documents With Changes in their Future

- Model Environmental Easement
- CERCLA Model RIFS
- CERCLA Model AOC
- CERCLA Model UAO
 - Could be a stand alone document for ICs only
- RCRA Models

